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No. 89-1555

In the Supreme Court of the United States
OCTOBER TERM, 1989

MARK E. DENNIS, PETITIONER

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the
Supreme Court of Nebraska

BRIEF FOR
AMERICAN TRUCKING ASSOCIATIONS, INC.
AS AMICUS CURIAE

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BRIEF FOR
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INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA and its members frequently invoke 42 U.S.C. § 1983 in litigation challenging state action that deprives them of their right under the Commerce Clause to engage in interstate commerce free of unreasonable burdens and unlawful discrimination. See, e.g., *American Trucking Associations, Inc.*

v. Scheiner, 483 U.S. 266 (1987); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *A.B.F. Freight System, Inc. v. Suthard*, 681 F. Supp. 334 (E.D. Va. 1988); *Commonwealth of Kentucky Transp. Cabinet v. American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988). They accordingly have a substantial interest in ensuring that the remedy set forth in 42 U.S.C. § 1983, and the concomitant entitlement to attorneys' fees under 42 U.S.C. § 1988, extend to violations of that constitutional right. ATA filed an amicus curiae brief in *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990), addressing the question whether Commerce Clause claims are cognizable under Section 1983.¹

ARGUMENT

THIS COURT SHOULD DECIDE WHETHER COMMERCE CLAUSE CLAIMS ARE COGNIZABLE UNDER SECTION 1983

In *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990), this Court granted review to consider, among other questions, whether the plaintiff was entitled to an attorneys' fee award under 42 U.S.C. § 1988 on the ground that it had prevailed on its claim under 42 U.S.C. § 1983 by proving a violation of the Commerce Clause. Because the Court vacated the court of appeals' judgment in that case on other grounds, it "decline[d] to resolve * * * the * * * question whether § 1988 fees are available in a Commerce Clause challenge." 110 S. Ct. at 1256. The present case provides the Court with another opportunity to resolve that important and unsettled legal question. The Court already has had the benefit of

¹ Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

full briefing and argument concerning the issue. Moreover, in contrast to *Lewis*, the issue is squarely and cleanly presented in this case. The petition for a writ of certiorari should therefore be granted. See also *Private Truck Council, Inc. v. Quinn*, 476 U.S. 1129 (1986) (Justice White, joined by Justices Brennan and O'Connor, dissenting from denial of certiorari) (recognizing that the Court should decide this issue).

A. The Lower Courts Disagree As To Whether Section 1983 Extends To Claims Under The Commerce Clause, And The Issue Is One Of Substantial Practical Importance.

There is a square conflict among the lower courts concerning the question presented in this case. A number of courts have held, like the court below, that Commerce Clause claims do not fall within the ambit of Section 1983. See *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989); *J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144-1145 (8th Cir.), cert. denied, 469 U.S. 834 (1984); see also Pet. 8 n.10 (citing cases).

Three courts of appeals have reached the opposite conclusion, holding that Commerce Clause claims may be asserted under Section 1983. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Continental Illinois Corp. v. Lewis*, 838 F.2d 457 (11th Cir. 1988), vacated on other grounds, 110 S. Ct. 1249 (1990). See also *Private Truck Council, Inc.*, 476 U.S. at 1129 (Justice White, joined by Justices Brennan and O'Connor, dissenting from denial of certiorari) (acknowledging

conflicting lower court decisions with respect to the question presented in this case).

Moreover, the question is one of substantial practical importance. As the United States observed in its amicus brief at the jurisdictional stage in *Lewis*, “the volume of Commerce Clause litigation makes the question of Section 1983’s coverage, and hence of Section 1988’s coverage, an important one.” 87-1955 U.S. Am. Br. at 19. Commerce Clause claims come before this Court with considerable frequency, and, of course, many more such actions are prosecuted in the lower courts each year.

As the petition demonstrates (at 12-15), Congress provided for awards of attorneys’ fees in Section 1983 actions because it concluded that the spiraling cost of litigation would otherwise deter plaintiffs from protecting rights secured by the Constitution. If, as the Nebraska Supreme Court held, attorneys’ fee awards are not available in cases in which a plaintiff successfully challenges state action under the Commerce Clause, the result is likely to be precisely what Congress sought to prevent: plaintiffs with meritorious Commerce Clause claims will decline to press those claims in court because they cannot afford to shoulder the cost of the litigation. Decisions like the one below thus erect a substantial obstacle to the full vindication of this fundamental federal right.

B. The Court Below Erred In Holding That Commerce Clause Claims May Not Be Brought Under Section 1983.

Review is warranted in this case for the additional reason that the narrow construction of Section 1983 adopted by the court below is plainly wrong.

The proper starting point is, of course, the language of the statute. Section 1983 provides a remedy when a person acting under color of state law deprives the plaintiff of “any rights, privileges, or immunities secured by the Constitution and laws” (emphasis added). Congress’s choice of words establishes that this remedial statute has the widest possible compass. “It is difficult to imagine broader language.” *United States v. James*, 478 U.S. 597, 604 (1986).

Indeed, this Court already has concluded that this phrase “must be given the meaning and sweep that * * * [its] language dictate[s]”; the remedy extends to rights secured by “all of the Constitution and laws of the United States.” *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 & n.16 (1972) (emphasis in original) (quoting *United States v. Price*, 383 U.S. 787, 797 (1966)). See also *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989) (“We have repeatedly held that the coverage of [Section 1983] must be broadly construed.”); *Monell v. Dep’t of Social Services*, 436 U.S. 658, 700-701 (1978) (“there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights”); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 663 (1979) (White, J., concurring) (Section 1983 “protect[s] against state invasions of any and all constitutional rights”) (emphasis in original).

The courts that have determined that Section 1983 does not provide a cause of action for violations of the Commerce Clause have rested that conclusion on the view that the Commerce Clause allocates power between the federal government and the states, and does not secure individual rights within the meaning

of Section 1983. See, e.g., *Consolidated Freightways*, 730 F.2d 1144-1145. This Court's decision in *United States v. Guest*, 383 U.S. 745 (1966), significantly undermines that conclusion. One question in that case was whether an indictment charging a conspiracy to deprive citizens of the "right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce" stated a violation of 18 U.S.C. § 241, which criminalizes conspiracies to intimidate the exercise of "any right or privilege secured * * * by the Constitution." Relying principally on the Commerce Clause as the source of the constitutional right to travel, this Court upheld the indictment on the ground that it alleged a conspiracy to deprive citizens of a right secured by the Constitution. 383 U.S. at 757-759. *Guest* thus establishes that the Commerce Clause secures rights cognizable under Section 1983.

More fundamentally, there is no reason why each provision of the Constitution must be classified as either creating rights or allocating authority in order to serve structural ends. In fact, of course, a single provision of the Constitution may serve *both* purposes. The right of individuals under the Commerce Clause to participate in a national market free of discriminatory or burdensome state regulation is both a structural rule, allocating regulatory authority between the federal and state governments, and a personal right, freeing all individuals from discriminatory state regulation not authorized by Congress. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (recognizing a "right" of constitutional dimensions to engage in "intercourse between state and state"). This right, which is fun-

damental to the national citizenship that the Constitution was established to secure, surely is protected by Section 1983.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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